Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

PETITIONER'S REPLY BRIEF

GEO. S. LEONARD, Esq.
1019 Nineteenth St., N.W.
Washington, D.C. 20036
Counsel for Petitioner

Of Counsel:

SAM CLAMMER
A. GILMORE FLUES
1019 Nineteenth St., N.W.
Washington, D.C. 20036

SUBJECT INDEX

	Page
Table of Authorities	I
I. SISA is not a principal cause of public school student withdrawal	3
II. The law recognizes a right of withdrawal from public facilities	5
III. It is the proposed desegregation of the SISA schools which is a direct restriction on the right of association	7
Conclusion	12

TABLE OF AUTHORITIES

Berry v. *Macon County Bd. of Education*, Civil Action No. 875-E (no official report, M.D.Ala. July 23, 1971)	7
Buckley v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976)	7, 8
Calhoun v. *Cook*, 522 F.2d 717 (5 Cir. 1975)	4
Charlotte Park and Rec. Comm. v. *Bairinger*, 252 N.C. 311, 83 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956)	6
Cook v. *Hudson*, 511 F.2d 744 (5 Cir. 1975), *reh. denied*, 515 F.2d 762, *cert. granted*, No. 75-503	7
Evans v. *Abney*, 396 U.S. 435 (1970)	6
Gilmore v. *City of Montgomery*, 417 U.S. 556 (1974)	2, 3
Healy v. *James*, 408 U.S. 169 (1972)	2
Johnson v. *Branch*, 364 F.2d 177 (4 Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967)	6
Mapp v. *Board of Education of City of Chattanooga*, 525 F.2d 169 (6th Cir. 1975) (*cert. pending*, No. 75-1077)	4
Monroe v. *Board of Commissioners*, 391 U.S. 450 (1968)	4
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972)	6
Olmstead v. *United States*, 277 U.S. 438 (1928)	5

TABLE OF AUTHORITIES—Continued

	Page
Palmer v. *Thompson*, 419 F.2d 1222 (5th Cir. 1970), *aff'd*, 403 U.S. 217 (1971)	6
Perry v. *Sinderman*, 408 U.S. 593 (1972)	6, 7
Pierce v. *Society of Sisters Hill Military Academy*, 268 U.S. 510 (1925)	6
San Antonio School District v. *Rodriguez*, 411 U.S. 1 (1973)	5, 10
Shubert v. *Verner*, 374 U.S. 398 (1964)	8
Spangler v. *Pasadana City Bd. of Education*, 519 F.2d 430 (9 Cir. 1975) (*cert. granted*, No. 75-164)	4
State ex rel. Swann v. *Pack*, 527 S.W.2d 99 (Sup. Ct. Tenn. 1975)	9
Thomas v. *Collins*, 323 U.S. 516 (1945)	8
Tonkins v. *City of Greensboro*, 276 F.2d 890 (4 Cir. 1960)	6
Torcaso v. *Watkins*, 367 U.S. 488 (1961)	2-3
United States v. *O'Brien*, 391 U.S. 367 (1968)	8
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	6
Wright v. *Council of City of Emporia*, 407 U.S. 451 (1972)	4

IN THE

Supreme Court of the United States

No. 75-278

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION,
Intervenor-Petitioner,

v.

MICHAEL C. McCRARY, INFANT BY CURTIS L. McCRARY AND SANDRA McCRARY AND COLIN M. GONZALES, INFANT BY RAYMOND GONZALES AND MARGARET R. GONZALES,
Plaintiffs-Respondents,

and

RUSSELL L. RUNYON, KATHERYNE E. RUNYON,
Defendants.

PETITIONER'S REPLY BRIEF

THE RESPONDING BRIEFS

The responding briefs * collectively raise a point which

* Brief for the Respondents; Brief Amicus Curiae of National Education Association (NEA); Brief Amici Curiae of Council for American Private Education, National Ass'n of Independent Schools and Southern Ass'n of Independent Schools (CAPE); Brief Amici Curiae of Anti-Defamation League of B'nai B'rith, American Jewish Congress, National Ass'n for the Advancement of Colored People and American Civil Liberties Union (ADL).

was not discussed in petitioner's principal brief, a matter which SISA would have considered irrelevant to the present issue were it not for the fact that the same question was mentioned by this Court in the *Gilmore* opinion as a possible consideration.

We speak of what NEA has termed the "ignoble purpose" of SISA parents to take their children out of desegregated public schools (NEA Bf. 8) with the effect that "they undercut effective school desegregation" (NEA Bf. 11). Respondent claims it to be a matter of public record that whites are "fleeing" from desegregated public schools (Resp. Bf. 25 ftn. 13) to "avoid effects of court-ordered desegregation decrees" (ADL Bf. 18).

SISA would not, and possibly could not, deny that some percentage of its parents may be so motivated. It has no information on the subject, having regarded it as improper to inquire into an individual's reasons for the exercise of what SISA believes to be a constitutionally protected parental right of school selection. As its principal brief shows, SISA is still of that opinion and argues in this reply that absent a predictable and substantial destruction of similar and preferred First Amendment rights held by others, no person should be called on to justify or explain his reasons for the exercise of a protected freedom.

> The requirement of *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect infringement of the members' associational rights.
>
> *Healy* v. *James*, 408 U.S. 169, 183; 92 S.Ct. 2338, 2347 (1972)

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion."

Torcasco v. *Watkins*, 367 U.S. 488, 495; 81 S. Ct. 1680, 1683 (1961)

* * * *

This reply is made in three parts: the scope of this public school withdrawal problem, the law on the right of withdrawal from public facilities, and the extent of the infringement if any, that the student association in SISA schools threatens with respect to the similar rights of others.

I

SISA Is Not A Principal Cause Of Public School Student Withdrawal.

The social problems created by the efforts of many persons and organizations to effectuate their claim of a constitutional obligation to desegregate public school systems have become national in scope.

In *Gilmore* you noted

> . . . the very exercise of the freedom to associate by some may serve to infringe that freedom for others.
>
> 417 U.S. 556, 575, 94 S.Ct. 2416, 2427 (1974)

It is reasonably patent that every exercise of a constitutional freedom by one individual diminishes the area of choice remaining to every other person. Attendance at church A diminishes the potential attendance at church B. The exercise of free speech to support dogma C lessens the potential recruitment in support of dogma D. The adherence of one unit of our free press to party E eliminates it as a potential adherent to party F. And, if it be argued that the action of one citizen would normally have no more than a *de minimis* effect, the reply is, how would you select which individuals in any given group of citizens should lose their constitutional freedom simply because others had already exercised the same privilege?

In precisely this sense every child who attends a private school—white or black or religious or other—diminishes the potential representation of his group in the public school of his neighborhood. And if that public school happens to be the subject of a desegregation order then every white or black child who is attending a private school reduces *pro tanto* the possibility of achieving some ideal of proportionate compliance based on the local student population.

But, this probable, and possibly inevitable, effect on the character of public school attendance is not limited in any sense to the children who are registered in the SISA schools. How many of the four million children in parochial schools were taken out of the public schools after 1954 for the same reason? For that matter, how many of the quarter million black children attending private schools in 1970-71 or now, had or have the same underlying motivation?

Or, we can take the even more important factor of "white flight", which this Court has sometimes taken into consideration in reviewing desegregation plans, *Monroe* v. *Bd. of Comm'rs*, 391 U.S. 450, 458; 88 S.Ct. 1700, 1705 (1968); *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 464, 92 S.Ct. 2196, 2204 (1972). White flight is a recognized national social phenomenon. The reason most often given by courts for this shift to the suburbs is a conscious or subconscious dissatisfaction of the parents with desegregated urban public school systems. Compared to the handful of children withdrawn from local public schools to attend private schools, "white flight" is by far a larger factor in determining the future character of our public schools, e.g., *Spangler* v. *Pasadena City Board of Education*, 519 F.2d 430 (9 Cir. 1975) (*Cert. Granted*, No. 75-164); *Mapp* v. *Bd. of Ed. of City of Chattanooga*, 525 F.2d 169 (6 Cir. 1975) (Petition here, No. 75-1077), *Calhoun* v. *Cook*, 522 F.2d 717 (5 Cir. 1975).

In short, the withdrawal of public school students to go to SISA schools is at most a minor part of the national difficulty in finding enough children to comply with some segregation orders. Both are simply a part of a national pattern of parent decision. As explained by this Court

> Education, perhaps even more than welfare assistance presents a myriad of "intractable economic, social, and even philosophical problems."
>
> *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 42, 93 S.Ct. 1278, 1301 (1973)

II

The Law Recognizes A Right Of Withdrawal From Public Facilities.

Mr. Justice Brandeis in one of his now famous dissents summarized the underlying essence of all negative Constitutional rights of the individual

> The makers of our Constitution . . . conferred as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.
>
> *Olmstead* v. *United States*, 277 U.S. 438, 478, 48 S.Ct. 564, 572 (1928)

It is this ability to walk away, to withdraw from a situation which a person refuses to accept, that constitutes the last recourse of the individual. When that refuge no longer remains, then a condition of slavery or dictatorship exists by definition—the power to compel the individual to accept and act in accordance with someone else's beliefs of moral right or governmental efficiency.

But when people do walk away from a publicly supported activity maintained at their cost and for their presumed benefit, that support may dwindle to the vanishing point.

The partial or complete frustration of an affirmative governmental purpose resulting from an exercise of an individual's right to withdraw from state-financed activities for racial or religious reasons is regarded as *damnum absque injuria* in the law. In the two *Pierce* cases you sustained the parents' right to withdraw children from the public schools despite a state law to the contrary. In *Yoder* you held that children could be withdrawn from state-compelled public schooling after threshold training in support of their parents' religious beliefs. In *Abney* you allowed the withdrawal of park property from bi-racial public use. In *Moose Lodge* you permitted the withdrawal of members from forced association with other segments of the general public.

For the same reasons lower courts have allowed the closings of public swimming pools, *Palmer* v. *Thompson*, 419 F.2d 1222 (5 Cir. 1970), *aff'd*, 403 U.S. 217, 91 S.Ct. 1940 (1971); *Tonkins* v. *City of Greensboro*, 276 F.2d 890 (4 Cir. 1960); or the sale of a public golf course, *Charlotte Park and Rec. Comm.* v. *Bairinger*, 252 N.C. 311, 83 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956), *id. Johnson* v. *Branch*, 364 F.2d 177 (4 Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

And you have many times held that such withdrawal from generally accepted forms of activity is not to be penalized.

> For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect to penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly". *Spieser* v. *Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Such interference with constitutional rights is impermissible.
>
> *Perry* v. *Sinderman*, 408 U.S. 593, 597, 92 S. Ct. 2694 (1972)

Among the many judicial expressions of this basic principle, we find only two cases interpreting its application to public withdrawal from public schools for the purpose of sending them to white private schools, *Berry* v. *Macon County Bd. of Educ.*, Civil A. No. 875-E (no official report, M.D. Ala. July 23, 1971), and *Cook* v. *Hudson*, (No. 75-503 *cert. granted*, Mar. 1, 1976). In *Berry* it was held that the teacher plaintiffs could not be dismissed from public employment to punish them for withdrawing their own children from a desegregated public school to send them "to an all-white segregated private academy"—even though their jobs could otherwise have been terminated on any non-constitutional basis. *Cook* was a holding to the contrary and SISA believes it was wrongly decided, *Perry* v. *Sinderman*, *supra*.

III

It Is The Proposed Desegregation Of The SISA Schools Which Is A Direct Restriction On The Right of Association.

The physical action of withdrawing a child from public school to send him to a SISA school, is not belief *per se* but rather is a form of expressing a belief. The responding briefs make much of the fact that the elimination or desegregation of the SISA schools would not deprive any of its parents of their right to hold a particular belief, merely to express it, (e.g. ADL bf. p. 7).

It is of course conceded that at least since Mr. Justice Holmes' famous illustration of the clear and present danger test, various forms of expression of First Amendment freedoms have been subjected to "reasonable regulation" of "time, place and manner", *Buckley* v. *Valeo*, —— U.S. ——, 96 S.Ct. 612 (1976). But to sustain such regulation three tests must first be met, none of which is applicable here.

First, the form of expression used should not include public violence, *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968). Second, a restriction on the time, place and manner of exercising the freedom should be "unrelated to the restriction of 'that freedom' ", *Buckley* v. *Valeo*, *supra*. Third, any such limitation must meet the test formulated in *Thomas* v. *Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 322 (1945) and subsequently repeated in *Shubert* v. *Verner*, 374 U.S. 398, 406, 83 S.Ct. 1790, 1795 (1963)

> Only the gravest abuses endangering paramount interests give occasion for permissible limitation.

The selection of SISA schools by parents offends none of these tests.

It is reasonably patent that the action of the SISA parents is non-violent in character. The form in which they exercise their constitutional freedom is consonant with the laws of every state and community in which the schools are located. No judicial choice has to be made here as to whether some "compelling interest" restriction is to be enforced. Equally, the continued maintenance of SISA schools in their present form involves no existing breach of any statute, or even of the licensing laws of the states concerned.

Second, the responding brief proposals to eliminate or integrate the SISA schools are directly related to the restriction of communication by the SISA parents—to the point of eliminating the last refuge in which their belief can presently find expression. The responding briefs claim that SISA parents will remain free to believe in the value of segregation in education—but argue the contradictory proviso that this belief must only be expressed in an integrated private school. An example of this contradition in terms is to be found in the ADL brief. There a plea is made on behalf of a "*bona fide*"

"qualified" (p. 13) applicant, presumably meaning a black child who sincerely believes in white segregated education but also believes that concept can only be expressed by desegregating the school which teaches it. Therefore it is not any admission policy of SISA's schools which infringes the interests of others, but rather the contrary proposals in the responding briefs that are directly related to restricting the associational rights of the SISA parents.

Third, does the limited admission policy of SISA schools constitute a "grave abuse" which "endangers paramount interests" of others?

There appears to be no definitive authority on what constitutes a "grave abuse". The fact situations in the cases appear to indicate that the phrase refers to some major departure from the conduct norms described in penal statutes, *State ex rel. Swann* v. *Pack*, 527 S.W.2d 99 (Sup. Ct. Tenn. 1975).

As noted, the maintenance of the SISA schools as presently constituted violates no local or federal statute. Nor is there any "abuse" of established community norms. During more than a hundred and fifty years in our republic before 1954, and for some thousands of years prior to our independence, the discriminative choice now being made by SISA parents was one which accorded with community custom in every known country. True, for the past twenty years, such preference for one's own group—at least with respect to white citizens —has been castigated as "racist". Yet it is the identical attitude which for the greater part of human history was described more favorably as "ethnocentric" and accepted as a customary personal attitude. While future events may prove that the newer vision is the only "right" one, and while there is little doubt that our institutions both public and private are currently being conformed to this modern view, the action taken by the SISA parents can at most be read as an outdated adherence to older educa-

tional belief, not as an abuse of or serious departure from long-established community standards.

Moreover, if every individual departure from current social norms is to be equated with the test of what constitutes a "grave abuse", then there would literally be no remaining scope for the expression of contradictory opinion or even the exercise of any First Amendment freedom. To the extent therefore that there remains any permitted exercise of the freedom of disagreement on this subject, these SISA schools constitute both an orderly and time-honored form of expressing previously acceptable ideas, an "abuse" only in the sense of an inability to concur with the views expressed in the responding briefs.

Can it be said that the SISA schools endanger the "paramount interests" of others? SISA says "no". First, what are those interests? The only non-discrimination interest we find detailed is in the introduction to the CAPE brief and accords with the action taken by the courts below:

> the opportunity of a private education [should] be available to those black persons as well as those white persons who seek it and can qualify for it. (Bf. p. 4)

It is not clear that the opportunity referred to is "paramount". Even the opportunity of a public education may not be a constitutional requisite, *San Antonio School District* v. *Rodriguez*, *supra*. But *arguendo* we assume it is such an interest.

SISA would concede that a different case might be presented if a SISA school was so located in the midst of a deserted area that its rejection of an applicant effectively destroyed any possibility of private or public schooling for the rejectee. As you said in *Rodriguez*, some "identifiable quantum of education [may be] arguably entitled to constitutional protection" (p. 37). But

when we read the responding briefs we find that it is compulsory education beyond state law through primary and secondary schooling which most of the commentators and the present responding briefs assume to be the requirement—and to which they would add the word "integrated."

Even if they were right in this regard the illustration we have assumed could hardly be further from the facts of this record. In our principal brief it was pointed out (pp. 32-33) that every school parent—not merely the SISA parents—has available a broad spectrum of choice of integrated or segregated education in public or private schools. It was noted that the record shows that all SISA schools are stipulated to be

> located in areas having cost-free desegregated public education available to all children
>
> (SISA bf. p. 4)

supported *pro tanto* by the SISA parents who in addition are assessed the costs of private tuition.

And the validity of those options is further made patent by the CAPE brief. CAPE claims to represent some 13,500 private schools all of which are integrated and states that 138 of those integrated private schools are located "in the same area of the country as the schools which are affiliated with SISA" (pp. 3, 17).

The continued operation of the SISA schools in their present form therefore does not endanger either private integrated educational opportunity or any other school attendance interests of other children. To the contrary it is these SISA parents who pay their share of public school support so that the children of others will have available to them the choice in education which these parents exercise for their own children.

Therefore the continued maintenance of the SISA limited admission policy is valid under any of the several

tests which have been applied to restrict the form of associating to express an unpopular belief.

CONCLUSION

SISA's policy of individual parental freedom in education is a simple one perhaps not fully understood by respondent and these *amici*. SISA supports the right of parental school choice as much by the self-identified "American Jews" and "Black Americans" whose organizations have joined in the ADL brief (p. 2), and by any other racial or religious group. As much as the claim of right for its own parents, it accepts and would support the integration preferences of the more numerous CAPE parents. In short, SISA argues for every parent having a right under the First Amendment to select any public or private school which will express their melting pot or pluralistic viewpoint, regardless of whether they do so for the purpose of conserving an older culture or creating a new order responsive to later opinion.

That some parents do choose SISA schools is simply one part of a national pattern of selective association. That the aggregation of all parent choices in this regard may on occasion leave an inadequate number of children of one or another group to form some idealized balance in public school association is a normal result of the exercise of the constitutional right to be let alone, to withdraw one's family from further participation in public activities. Above all, the action of the SISA parents neither constitutes an abuse of their own constitutional privilege nor denies its exercise to any others.

What SISA claims in this case is the right of its parents to make their own school choice and not to be called on to justify their reasons for doing so. To interpret § 1981 so as to restrict that choice would deny

them any remaining possibility of exercising their constitutional freedom to associate their children in a private school expressive of their beliefs.

Respectfully submitted,

GEO. S. LEONARD, Esq.
Attorney for Petitioner
Southern Independent
School Association

March 3, 1976